**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
| | ) | |
| Accelerating Wireless Broadband | ) | WT Docket No. 17-79 |
| Deployment by Removing Barriers to | ) | |
| Infrastructure Investment | ) | |

# COMMENTS OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AND THE UNITED SOUTH AND EASTERN TRIBES SOVEREIGNTY PROTECTION FUND

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## *I. INTRODUCTION*

The National Congress of American Indians (NCAI) and the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) write to oppose the draft Report and Order released on March 1, 2018 that purports to narrow the obligations of the Federal Communications Commission (FCC or Commission) under the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA) as well as restrict Tribal Nation rights secured by these laws. The draft Report and Order adopt an overall approach that would be detrimental to tribal governments, tribal culture, and tribal historic resources as well as contrary to the Commission's trust responsibility. We believe it strikes the wrong balance between the trust responsibility and historic and environmental concerns on the one hand, and the economic interests of the telecommunications industry (Industry) on the other, and we believe it in critical part is unlawful. We renew our willingness to consult on practical options for expediting the 5G build out without compromising tribal historic preservation interests. We ask that all Commissioners vote against adopting this draft Report and Order.

**The current system has accelerated the telecommunications build-out over the past 15 years.** Under the NHPA, the FCC has an obligation to consult with tribes whenever a "federal undertaking," which includes licensing, could affect properties to which an Indian tribe or Native Hawaiian organization attaches religious or cultural significance. 16 U.S.C. Section 470a(d)(6)(B). Fifteen years ago, the FCC complained about the practical difficulty of potentially consulting on thousands of sites. NCAI and USET supported the Tower Construction Notification System (TCNS) as an elegant solution to this logistical problem by providing that if Industry could work out any issues with concerned Tribal Nations then the FCC would not have to engage in consultation for any given site. This facilitated the rapid deployment of the telecommunications infrastructure, even though Industry likes to portray it as an impediment in an effort to cut its costs. A true impediment would be Tribal Nations demanding consultation on every site that is located at a high point, along an historic transportation route, or in another area of sensitivity. The Dakota Access Pipeline situation illustrates what happens when the Federal government fails to consult properly with Tribal Nations and Industry seeks to play the situation fast and loose.

**The FCC is rejecting Tribal Nation recommendations in order to provide a solution that Industry has sought for years, which is to effectively ignore and disempower Tribal Nations.** The Commission's draft Report and Order is particularly frustrating since both NCAI and USET SPF have approached the deployment of 5G technology in a supportive manner (Tribal Nations desperately need broadband capability) and its implementation in practical terms. Indeed, fifteen years ago, the FCC negotiated "best practices" with USET (in consultation with NCAI) that address nearly every issue raised by Industry, so there is no need for many of the wholesale changes proposed in the draft Report and Order.[1] The FCC–USET Best Practices represent a practical approach to assuring an efficient review process without jeopardizing tribal cultural interests. Over the last couple of years, NCAI and USET SPF have expressed a willingness to revisit and modernize its terms, even though as drafted it anticipated nearly all of Industry's concerns. It was

[1] FCC-USET Voluntary Best Practices for Expediting the Process of Communications Tower and Antenna Siting Review pursuant to Section 106 of the National Historic Preservation Act, 2004, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-253516A2.pdf.

disconcerting to us to learn that Industry representatives were not aware of these Best Practices or were willfully ignorant of them because Industry's goal is to remove tribal interests and concerns from the process.

The Commission asserts in the draft Report and Order, without any support, that "arguments that the Commission should exclude small wireless facilities from Section 1.1312 when deployed in a narrower range of circumstances do not demonstrate sufficient benefits to justify the burdens they impose even in a narrower context."[2]

The Commission provides no support or analysis for this assertion, *yet this is the crux of the matter*. NCAI and USET SPF strongly believe that it is possible to describe a narrower range of circumstances and that the wholesale exemption of all small wireless facilities truly is arbitrary and capricious.

In good faith, our organizations have sought to respond to Industry concerns and we do not understand why our efforts are dismissed so lightly, except that Industry's economic concerns are outweighing all other possible approaches. As an example of our efforts to work with Industry, in 2016 and early 2017, Industry presented four principles that they would like to see addressed in the Section 106 process. ***Notably, they did not raise fees in those four principles.*** USET SPF, in consultation with NCAI, responded to each of the principles with a reasonable path forward:

> **Industry Principle 1: 30 days is a reasonable time for tribal response.** USET SPF agrees that 30 days is a reasonable timeframe for a tribal response, subject to certain conditions. Most notably, the 30 days should run from the moment that the tribe has received the information it has identified as necessary for undertaking a site evaluation (see discussion under Principle 3, below about the scope of that information). Several USET SPF tribes have reported that Applicants often do not provide the necessary information or delay in providing it; on the other hand, other USET SPF tribes describe having an excellent relationship with the representatives of Applicants (generally, the archaeological consulting firms), who quickly come to know what the Tribe needs and provide it in a timely fashion. While Applicants seek to hold Tribes accountable to these timelines, Applicants must also be held accountable.
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> **Industry Principle 2. TCNS needs to be updated to reflect the evolution of wireless technology.** USET SPF agrees that TCNS should be updated as needed to reflect technological and other changes.
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> **Principle 2.a. Previously Cleared Sites.** USET SPF agrees that once a site has been cleared by a Tribe, absent an inadvertent discovery or significant new information, an Applicant should not have to consult that Tribe again so long as additional activities are within the original reviewed "footprint." Please note,

[2] FCC, Draft Second Report and Order, *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT. Docket No. 17-79, ¶ 85 (March 1, 2018) (citation omitted) [hereinafter "FCC, Draft Report and Order"].

however, that important Tribal interests, such as burials, have been found under roads and other surfaces that were put in place before proper reviews were required. USET SPF emphasizes that Tribal concerns are generally triggered if there is ground disturbance, such as trenching, additional power lines, etc. In some limited situations there can be visual disturbances, as well. If a project does not disturb the ground, and there is no visual disturbance, than it is unlikely to affect a Tribal concern. USET SPF does not think that existing rights of way can automatically be excluded from review, unless there is no new ground disturbance and no visual disturbance of a cultural property.

**Principle 2.b**. **Identification of Areas of No Interest.** USET SPF agrees that it would be beneficial for Industry, FCC and Tribes to spearhead an effort to identify geographic areas where no review is needed. To some extent TCNS already provides for Tribes to identify such areas, but this should be promoted further. However, it should not be held against a Tribe if it chooses not to participate in this process. USET SPF has already agreed in the Best Practices to support alternative practices and amendments (see Best Practices *I. Alternative Procedures, II. D* and *Amendments and Future Meetings, XII*). The Best Practices contemplate different levels of review for different types of sites (see discussion under Principle 3 below). The TCNS should allow for input of theses varying classifications in order to facilitate the appropriate level of review. However, if there is a lesser standard of review (such as "cursory review") for a certain type of area those lesser standards must be specified and agreed to by each affected Tribe.

**Principle 2.c. Advance Notice of Change in a Tribe's Area of Interest.** USET SPF supports giving the FCC an Applicants 90-days advance notice of a change in a Tribe's area of interest. This is to allow an Applicant to decide whether or not to proceed in that area; not to encourage Applicant's to rush through a project within the 90-day period.

**Industry Principle 3: Uniformity of required information should be established.** USET SPF supports Tribes identifying in advance the information they will need to evaluate a site. Those requirements should be posted on the TCNS so an Applicant can rely upon them. While in many cases it may be sufficient for a Tribe to receive the information required by Form 620, New Tower Submission Packet, or Form 621, Colocation Submission Packet, USET SPF has learned that that is not always the case. Tribes may require other information or even less information (such as for a site inside a building). The guide as to what is required should be what a Tribe identifies on the TCNS.

**Industry Principle 4: Tribal monitoring requirements should be clarified and standardized.** The Best Practices recognize that on-site evaluations are not automatic or standard, but rather provide that "in some situations…it may be necessary for a Tribe to evaluate a tower site in person." See III.D. USET SPF is prepared to expand on a reasonable procedure for site evaluations and monitoring,

> including encouraging Tribes, at their option, to work together to coordinate any necessary monitoring.
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> **Potential Principle 5 Proposed by USET: Reasonable tribal fees are appropriate for the provision of professional services and the facilitation of the completion of the Section 106 process.** 36 CFR 800.4(C)(1) recognizes that Tribes have "special expertise" in the evaluation of sites of importance to them. Indeed, Tribes have unique expertise that is generally not replicable by individuals outside the Tribe. Like access to engineering, environmental, architectural and other expertise, access to Tribal expertise should be compensated at a fair rate.[3]

Tribal Nations and Industry should both work towards the efficient roll-out of new technology, while assuring the protection of priceless tribal heritage. However, without a Tribal Nation's unique expertise in its cultural and religious history, it is impossible to properly evaluate the potential impact of a proposed facility on properties of cultural and religious significance to a particular affected Tribal Nation. Tribal expertise is essential to the evaluation of tribal cultural property.

**FCC Responsibilities in Outlier Situations**. Where there have been outlier examples of both Tribal Nation and Industry bad faith, we have urged the FCC to intervene rather than cite those examples as the cynical basis for wholesale changes that dilute tribal rights and weaken protection of tribal sites.[4] For example, the draft Report and Order includes an example about tribal fees associated with improving cell coverage around the Super Bowl. NCAI and USET SPF resent the use of this example because our two organizations have repeatedly agreed that just such circumstances (assuming that the Super Bowl example has been accurately described) represent a situation where significant Tribal Nation review is likely not warranted. We cannot judge this particular situation, because we are not familiar with the details and Industry made no effort to reach out to us to facilitate any needed discussions; however, the FCC itself should intervene if a Tribal Nation or an Industry actor is being unreasonable. In the end, carving out a specific exception for circumstances like the Super Bowl is a better tailored response than the wholesale exception for small wireless facilities proposed in the draft Report and Order.

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[3] Assessing Commonalities Between the Principles Proposed by Industry and the USET-FCC Best Practices (Memorandum to FCC Officials and Industry Representatives), USET Sovereignty Protection Fund, January 18, 2017.

[4] Notably, the FCC entered into an Memorandum of Understanding with USET that is still in effect that provides:

> The Commission and USET will continue to work together on means to improve the ability of the Tower Construction Notification System to facilitate compliance and reduce burdens in the Section 106 process.

MOU between the FCC and USET regarding Recommended Best Practices and the Section 106 Process, II.E. NCAI also subscribes to this approach. However, the draft Report and Order represents a unilateral action by the FCC to amend the process while disregarding tribal efforts to work with the FCC on mutually agreeable amendments to the process. This is in part due to the failure to consult adequately with Tribal Nations regarding the specific terms of any amendment to the existing process.

## *II. THE COMMISSION'S CONCLUSION THAT SMALL WIRELESS FACILITIES DO NOT QUALIFY AS 'UNDERTAKINGS' OR 'MAJOR FEDERAL ACTION' IS OVERBROAD AND UNLAWFUL*

The draft Report and Order proposes to draw a distinction that "the deployment of small wireless facilities by private parties does not constitute an 'undertaking' or 'major Federal action'" under NHPA and NEPA respectively.[5] Of course, it is well-established that: (1) licensing is a federal undertaking, and (2) none of these small wireless facilities[6] can broadcast without a license.[7]

Notably, the FCC itself emphasizes its responsibility to manage and license the electromagnetic spectrum, including for wireless services:

> The FCC is responsible for managing and licensing the electromagnetic spectrum for commercial users and for non-commercial users including: state, county and local governments. This includes public safety, commercial and non-commercial fixed and mobile wireless services, broadcast television and radio, satellite and other services.[8]

The question of whether an undertaking is subject to NHPA or NEPA may extend to private parties in a number of scenarios not contemplated by the Commission's proposed blanket exemption.[9]

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[5] FCC, Draft Report and Order, ¶ 35.

[6] We note that the draft Report and Order's definition of "small wireless facility" does not take into account supporting infrastructure like power and communication lines, making it possible that such facilities will have a much larger footprint that the FCC conveys.

[7] *See* Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown, 948 F.2d 1436, 1445 (5th Cir. 1991) ("[A]s long as the [riverside] park project is under federal license and the [Army Corps of Engineers] has the ability to require changes that could conceivably mitigate any adverse impact the project might have on historic preservation goals, the park project remains a federal undertaking and NHPA review is required."); Quechan Tribe of Ft. Yuma Indian Reservation v. U.S. Dep't of the Interior, 927 F. Supp. 2d 921, 933 (S.D. Cal. 2013), *aff'd sub nom.* Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior, 673 F. App'x 709 (9th Cir. 2016) (Company requested approval from the Bureau of Land Management to build a wind farm and Section 106 consultation was required); Lee v. Thornburgh, 877 F.2d 1053, 1056 (D.C. Cir. 1989) (Section 106 "imposes obligations on agencies in either of two situations. An agency having authority to license an undertaking may not issue such a license without fulfilling these obligations. Likewise, an agency with jurisdiction over a federal or federally-assisted project must comply before approving funds for it."); and Mid States Coal. for Progress v. Surface Transp. Bd., 345 F.3d 520, 554 (8th Cir. 2003) ("The ACHP's regulations, when read it their entirety, thus permit an agency to defer completion of the NHPA process until after the NEPA process has run its course (and the environmentally preferred alternatives chosen), but require that NHPA issues be resolved by the time that the license is issued.").

[8] https://www.fcc.gov/licensing-databases/licensing.

[9] *See* Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 33, 37 (D.C. Cir. 2015) (stating "Federal actions subject to NEPA include federal authorizations granted to private parties…." and that "'federal actions' may encompass the federal government's own undertakings, such as promulgating a rule or building a public project, as well as government authorizations or support of non-federal activities, such as approving private construction activities 'by permit or other regulatory decision.'" (citing 40 C.F.R. § 1508.18(a) and (b)(4))).

*a.* NEPA cannot be skirted based solely on the size of the project and whether a private party carries out construction.

NEPA requires that "federal agencies prepare and make publicly available, in anticipation of proposed 'major Federal actions significantly affecting the quality of the human environment,' an Environmental Impact Statement (EIS) that assesses the action's anticipated direct and indirect environmental effects, and that the agencies consider alternatives that might lessen any adverse environmental impact.'"[10]

As discussed earlier, NEPA often extends to private parties where, for example, the project takes place on federal lands, or requires federal approval, such as licensing or permitting, and where the project is made possible by federal resources, such as funding or contractual agreements. For this reason, the blanket exemption for actions taken by private parties is wholly inconsistent with NEPA.

NEPA does not focus on the size of a project, but rather is entirely concerned with its possible environmental effects. The Commission's proposed blanket exemption for small wireless facilities is wholly inconsistent with NEPA's requirements with respect to cumulative effects of federal actions. "'NEPA requires an agency to consider' cumulative effects, which 'result[] from the incremental impact of the action when added to other past, present and reasonably foreseeable actions regardless of what agency . . . or person undertakes such other actions.'"[11]

In this instance, the Commission states its intentions are to "facilitate[] the deployment of advanced wireless services (such as 5G) and remove[] regulatory burdens that unnecessarily raise the cost and slow the deployment of the modern infrastructure used for those services."[12] The Commission acknowledges the increased consumer demand for increased coverage and capacity, stating that "providers will need to deploy tens of thousands of small wireless facilities across the country over the coming years."[13] In addition, the Commission notes that "Verizon states that next generation networks will require 10 to 100 times more antennae locations . . . , while AT&T represents that carriers will deploy more small wireless facilities in the next three and a half years than the number of macro facilities deployed in the last 35 years."[14]

Despite the extraordinarily extent of future deployments, the Commission spends no time considering potential cumulative environmental effects of such broad deployment, instead simply asserting that "[i]t would be impractical and extremely costly to subject each individual small facility deployment to the same requirement that the Commission imposes on macro towers."[15] In

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[10] *Id.* at 37.
[11] Ctr. for Envtl. Law & Policy v. United States Bureau of Reclamation, 655 F.3d 1000, 1007 (9th Cir. 2011) (citing NRDC v. U.S. Forest Serv., 421 F.3d 797, 814 (9th Cir. 2005)).
[12] FCC, Draft Report and Order, ¶ 37,.
[13] *Id.* (citing Philip Tracy, RCR Wireless News, "What is network densification and why is it needed for 5G?," Nov. 9, 2016, available at https://www.rcrwireless.com/20161109/fundamentals/network-densification-5g-tag31-tag99).
[14] *Id.* (citing Verizon Comments at 3 and AT&T Comments at 4).
[15] *Id.*

short, the Commission, when faced with an opportunity to analyze the potential cumulative environmental effects of next generation networks, proposes to shirk its duties and obligations under NEPA in favor of easing cost and regulatory burdens for private industry. This is unlawful.

*b.* 'Undertaking' under NHPA

The NHPA provides protection for "districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering, and culture."[16] The NHPA does this by requiring federal agencies engaged in a "federal undertaking" to "take into account the effect" the undertaking may have on historic properties "included", or "eligible for inclusion" in the National Register of Historic Places.[17] The NHPA is implemented through a complex regulatory scheme (the Section 106 process), a consultation process through which federal agencies collect information concerning a particular site's eligibility for the National Register, potential adverse effects the undertaking may have on the site, and ways to mitigate adverse effects.[18]

This consultation obligation falls on the Commission, not on Industry. This principle is firmly embedded in the law and expressly addressed in the memorandum of understanding that the FCC entered into with USET:

> Whereas, the Commission and USET recognize and agree that the involvement of Commission Applicant in this process does not nullify or substitute for the Commission's obligations to consult with Tribes under section 101(d)(6) of the NHPA, or abrogate the general trust relationship which the Commission has with Tribes.[19]

The NHPA has always required consultation with tribes, but in 1992 it was specifically amended to clarify and mandate such consultation. The 1992 amendments state that federal agencies "shall consult with any Indian tribe and Native Hawaiian organization that attaches religious or cultural significance" to properties that might be affected by a federal undertaking.[20] The FCC licensing process for wireless facilities is a Federal undertaking.

The NHPA sets forth two distinct requirements with regard to Tribes. First, the NHPA obligates a Federal agency to evaluate its undertakings for their impact on tribal historic properties.[21] In carrying out this obligation, a Federal agency would, in most cases, need to secure the cultural and religious expertise of any Tribe whose historic property could be affected in order to properly evaluate the impact of that undertaking on that Tribe's historic property.

Second, a Federal agency is obligated to seek official tribal views on the effect of an undertaking, a distinct exercise from securing the Tribe's cultural and religious expertise for evaluating the

[16] 54 U.S.C. § 302101.
[17] *Id*.
[18] *See* 34 C.F.R. Part 800.
[19] MOU between the FCC and USET regarding Recommended Best Practices and the Section 106 Process, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-253516A2.pdf.
[20] 54 U.S.C. § 302706(b) (emphasis added).
[21] 54 U.S.C § 302706(a).

impact of an undertaking. The NHPA tribal consultation requirement applies broadly to traditional religious and cultural properties of Native Americans and Native Hawaiians, and makes no distinction with respect to tribal religious or cultural properties located on or off tribal lands.

Under the current Commission framework, an "undertaking" means "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring federal permit[,] license, or approval."[22] Further, NHPA requires agencies to consider the potential impacts of their undertakings on "historic properties."[23] The FCC's effort to exclude small wireless facilities falls short of these standards. In the draft Report and Order, the FCC argues that:

> In particular, although geographic area service licenses are a legal prerequisite to the provision of licensed wireless service, and can affect entities' economic incentives to deploy small wireless facilities-insofar as the facilities can be used to offer the licensed service-neither the geographic area service license nor any other Commission approval is a legal prerequisite to the deployment of those particular facilities.[24]

The FCC cannot have it both ways: it cannot acknowledge that there is limited economic incentive to build facilities without a license and then state that NEPA and the NHPA do not apply because those facilities could still be constructed without a license, even if they couldn't be used, a circumstance that will never occur. The Draft Report and Order cites to *Western Mohegan Tribe and Nation of New York v. New York*, 100 F. Supp.2d 122 (N.D.N.Y. 2000) to support this ridiculous assertion, but that holding is clear that the permit in question did not pertain to the actual undertaking at all (the creation of the park), whereas it is an absolute necessity for telecommunication companies to have a license in order to broadcast from small wireless facilities.

For this reason, considerations regarding "undertakings" are neither dependent on the size of a project or facility nor whether the activity is being carried out by a private party. In other words, it makes no difference if an undertaking is small or large, or whether the undertaking is being carried out by a private party instead of the governing agency, what matters instead is that there is a "federal undertaking" and then the effect of the undertaking on historic property.

To this end, the Commission has failed to demonstrate that small cell deployment will have no adverse effects on tribal cultural and historic properties. While the Commission notes "the lower likelihood of impact on surrounding areas"[25] of small cell technology, nowhere in the draft Report and Order does the Commission provide evidence that small cell technology will have no adverse

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[22] 20 FCC Rcd 1073, n. 24, 25 and 26; *see also* CTIA-The Wireless Ass'n v. FCC, 466 F.3d 105 (D.C. Cir. 2006) (stating "The Act defines an undertaking as: a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(A) those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal *permit[,] license, or approval*; and (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." (citing the NHPA and adding emphasis)).

[23] NHPA, 54 U.S.C. § 306108.

[24] FCC, Draft Report and Order, ¶ 80.

[25] FCC, Draft Report and Order, ¶ 34.

impact on cultural and historic properties. For instance, a small wireless facility placed directly on or contingent to an area of cultural or historic significance would be in violation of NHPA. For this reason, NCAI and USET SPF assert that a "lower likelihood" of adversely effecting tribal historic and cultural properties is insufficient justification for a blanket exemption for an entire generation of telecommunications technology from historic preservation review.

The rationale for the exclusions is an advance determination that there is a "de minimus" possibility of an adverse impact from these small wireless facilities, despite their incredible proposed numbers. NCAI and USET SPF find this assertion incredible. Many of these small wireless facilities would fall within the rights of way of transmission lines, Interstate highways and railway corridors. These are huge swaths of land that, in many cases, have been built, not coincidentally, on top of ancient Indian trails and trade routes, frequently crossing areas of dense Indian habitation. The European explorers, contrary to their own myth, did not "discover" an untamed wilderness. Millions of Native people lived within the continental United States in 1492. They had developed complex societies and complex economies. They developed substantially and heavily traveled trade routes. These routes tended to follow natural geographic features (flat lands, mountain passes, along rivers, etc.). The earlier settlers took advantage of the existing trails and, over the years, built thereon the vary transportation routes where the telecommunications industry will focus much of its development. Examples of these established trade routes that turned into major 21st century thoroughfares are the Cumberland Gap, Snoqualmie Pass and The Dalles, all of which have major highways passing through them.

Further, the Commission mischaracterizes the holding in *CTIA- The Wireless Ass'n v. FCC*, stating that that case affirms the Commission's discretion in this instance. Instead, *CTIA* affirmed the Commission's determination that the "construction of a wireless communications tower constitutes an 'undertaking' subject to Section 106 of the NHPA."[26] In doing so, the court noted that NHPA regulations "provide that agencies 'may develop procedures to implement section 106 . . . if they are consistent with the [Advisory Council on Historic Preservation]'s regulations,' . . . a determination that the Council itself makes."[27] The court also noted that "[a]gencies and the Council may also 'negotiate a programmatic agreement to govern the implementation or a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings,'" stating that "[s]uch programmatic agreements are frequently used for undertakings whose effects are 'similar or repetitive' or 'cannot be fully determined prior to approval' of the undertaking."[28] The court further described the process where agencies and the Council enter into programmatic agreements, specifically mentioning the requirement to consult, as appropriate, with Indian tribes, State or Tribal Historic Preservation Offices, the National Conference of State Historic Preservation Officers, other federal agencies and the public prior to entering into such agreements.[29] In short, the court in *CTIA* affirmed the Commission's determinations with respect to undertakings, which were lawfully developed through a formal programmatic agreement process. Ultimately, what this case really stands for is the proposition that the Commission can proceed, in consultation with Tribal Nations, in the development of a programmatic agreement regarding small wireless facilities.

[26] CTIA- The Wireless Ass'n, 466 F.3d at 108.
[27] *Id.* at 107.
[28] *Id.*
[29] *Id.*

The Commission's proposed blanket exemption from NHPA is inconsistent with Section 106 and absent from its own Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process (NPA Order).[30] The portion of the draft Report and Order concluding that "small wireless facilities" are not "undertakings" for purposes of NHPA is also unlawful because it purports to make Section 106 determinations without the necessary approval of the Council, and outside of the programmatic agreement process.

With respect to policy implications, rolling back these protections for tribal cultural and historic properties will have grave consequences for Tribal Nations. Once these resources are damaged, it is often irreversible. Accordingly, Tribal Nations will have no recourse if the deployment of small cell technology results in the destruction of tribal cultural and historic properties.

The Commission further asserts that "the public interest is not served by requiring small cell facilities to continue to adhere to this costly review process."[31] It is also costly to lose forever irreplaceable heritage. In Section 1(b)(4) of the National Historic Preservation Act, Congress finds and declares that "the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans."[32] As Tribal Nations are the keepers of America's earliest heritage and history, it is in the American public interest to preserve our historic and cultural heritage. Tribal Nations play a critical and wholly unique role in preserving these properties. Moreover, NCAI and USET SPF have come to the FCC in a spirit of willingness to reevaluate appropriate costs, but has received no substantive response to these proposals. No one expects the engineers, environmental or other consultants to provide their expertise for free; why should Tribal Nations?

For the aforementioned reasons, NCAI and USET SPF assert that the Commission's conclusion that small wireless facilities do not qualify as "undertakings" or "major Federal actions" is overbroad and unlawful.

## *III. THE COMMISSION'S PROPOSAL TO ELIMINATE INITIAL TRIBAL FEES LEAVES TRIBAL NATIONS WITHOUT THE RESOURCES NEEDED TO RESPOND TO NUMEROUS AND LENGTHY APPLICATIONS*

The Commission has clearly acted in the best interests of the wireless industry regarding tribal fees. As we have contended in every comment our organizations have provided to the Commission, unilaterally changing the rules for all 573 Tribal Nations in response to the actions of a few Tribal Nations is irresponsible and bad policy (especially as the Commission appears to give no weight in the creation of this "crisis" to the contribution of Industry actors who have failed to provide

[30] *See* NPA Order, 20 F.C.C. R. 1073, 1075 P.2 (2004).
[31] FCC, Draft Report and Order, p. 14.
[32] Section 1 of the National Historic Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515 (b)(4) http://www.achp.gov/nhpa.pdf.

sufficient or timely information to Tribal Nations.[33] The Commission continues to cite a handful of unverified, outlier examples of tribal fees when attempting to justify this drastic change in the fee structure. Rather than consulting on a government-to-government basis with the few tribes that purportedly charged outlier amounts, the Commission has chosen to penalize all Tribal Nations. Tribal Nations are concerned that the Commission is relying very heavily on the data and monetary figures provided by the private industry. The Commission has not released or publicized any study of its own that characterizes the amount of fees charged by Tribal Nations. Simply citing industry numbers paints a one-sided story.

We believe that many of the processes outlined in the draft Report and Order contradict the FCC-USET's existing Voluntary Best Practices.[34] As our organizations have asserted since the beginning of the discussion on this topic, the Commission should consult with Tribal Nations on the adoption of the USET Best Practices, as appropriately modified to the circumstances of each Tribal Nation. The draft Report and Order adheres to some of the USET Best Practices related to timing, but it completely disregards the necessity of tribal fees.

In the June 15, 2017 NCAI and USET-SPF comments (WT 17-79), we noted:

> The NPRM asks "should the Commission infer if the applicant does not ask explicitly for such information and documentation, then no payment is necessary?" No, the Commission should not infer that to be the case. If the Commission created such an inference or presumption, it would unfortunately ***encourage Industry practices that would take advantage of the fact that many Tribes are under resourced*** and cannot always respond quickly. Such an inference is also contradictory to the principles behind the FCC-USET Best Practices and would essentially violate the Trust Responsibility. The Applicant should expect to pay for the work product and to follow the law, regardless of the applicant's explicit request for information and documentation, when Tribes make determinations on effects to their statutorily protected cultural and historic properties.

The draft Report and Order's elimination of initial fees essentially will have the effect of assuring that Tribal Nations, who often receive hundreds of requests every month, will simply not be able to respond. The FCC charges fees for its services; similarly Tribal Nations should be able to recoup the reasonable costs associated with these reviews. Tribal Nations are providing invaluable and indeed unique expertise that provides an assurance that a site will not be disturbed or that the appropriate mitigation has occurred. Only a Tribal Nation can provide a definitive statement on the meaning of a cultural property. No one with such a level of expertise in any other quarter of our society would be expected to provide that expertise for free. This action does not uphold the trust responsibility and does not respect tribal sovereignty.

[33] NCAI and USET SPF do recognize that the Commission is proposing to require that Industry provide certain baseline information for "covered" wireless facilities, which is helpful, but should not prevent Tribal Nations for asking and receiving additional information they might require to conduct a proper evaluation.
[34] FCC-USET Voluntary Best Practices.

## *IV. THE COMMISSION MISCHARACTERIZES THE EXTENT OF FORMAL TRIBAL CONSULTATION CARRIED OUT PRIOR TO RELEASING THE DRAFT REPORT AND ORDER*

In its 2000 *Tribal Policy Statement*, the Commission recognized and memorialized its trust relationship with federally-recognized tribes, which "requires the federal government to adhere to certain ***fiduciary*** standards in its dealings with Indian Tribes."[35]

The Commission went on to reaffirm its commitment to nine separate goals and principles, including:

> The Commission, in accordance with the federal government's trust responsibility, and to the extent practicable, will consult with Tribal governments prior to implementing any regulatory action or policy that will significantly or uniquely affect Tribal governments, their land, and resources.[36]

The Commission has met with Tribal Nations, but few of those meetings could be deemed consultation. First, there was no discussion over the specific proposals and actions under consideration by the FCC; and second, the formats generally lent themselves to listening sessions, where statements are made, but there is no consultation. Listening sessions are very valuable; consultations are mandated by law. It is not clear all the activities deemed consultation efforts in the draft Report and Order constitute formal government-to-government consultation. As an initial matter, essential tenets of consultation include sufficient notice, in person interaction, and a *dialogue* among sovereigns. Although in-person and telephonic listening sessions are useful mechanisms for understanding tribal concerns, they are not interactive and are more akin to the public comment process. The draft Report and Order also characterizes as consultation the delivery of remarks at conferences and general tribal meetings where the TCNS was mentioned. None of these activities constitute tribal consultation.

For example, the Commission notes that on June 14, 2017 Chairman Pai participated in one-on-one consultations with a number of Tribes at NCAI's Mid-Year Conference. We greatly appreciate the time that Chairman Pai took to attend this meeting and to meet with tribal leaders. We believe some important dialogue took place on the general issues involving 5G build-out. However, not all meetings mentioned in the draft Report and Order included discussion of Section 106. Many Tribal Nations discussed other issues with the Chairman like inaction on the Operating Expense Limitation Rule, the Rural Health Care Program, and wireline deployment in Indian Country. Conversations and meetings with tribal leaders that did not address Section 106 should not be characterized as consultation in the draft Report and Order on this issue. Listing them as such creates an inaccurate record.

In addition, USET SPF acknowledges that Commissioner Carr did attend its Impact Week 2018 Board Meeting in February. Although the draft Report and Order makes note of some of what was expressed to the Commissioner by the Tribal leaders on the USET SPF Board, this meeting did

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[35] *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078 (2000) [hereinafter Tribal Policy Statement].
[36] *Id.*

not include any substantive dialogue between the Commissioner and the tribal leaders. It was very much a listening session.

The January 24, 2018 and February 5, 2018 conference calls are clearly not tribal consultation. A conference call with one to two weeks prior notice is not a consultation; it is simply a conference call. Characterizing these conference calls as a tribal consultation is inaccurate and should be removed from the list of consultations for the record.

NCAI and USET SPF have also heard from Tribal Nations that individual requests for consultations have not all been addressed. The FCC should not move forward with this item until all requests for individual consultations are complete. We are very concerned about the Commission's lack of consultation on the specifics of this draft Report and Order.

We request that consultation by the Commission always include 30-day notice to Tribal Nations; face-to-face interaction between tribal leaders and the Commission; and *dialogue* that addresses the details of Commission proposals and answers all questions posed by Tribal Nations.

## *V. GENERAL PRINCIPLES OF FEDERAL INDIAN LAW RECOGNIZE TRIBAL SOVEREIGNTY, PLACE TRIBAL–US RELATIONS IN A GOVERNMENT-TO-GOVERNMENT FRAMEWORK, AND ESTABLISH A FEDERAL TRUST RESPONSIBILITY TO INDIAN TRIBES.*

General principles of the United States' trust responsibility toward Tribal Nations are rooted in the U.S. Constitution (Art. I, Section 8), Federal case law, Federal statutes (including the NHPA, NEPA, the Native American Graves Protection and Repatriation Act (NAGPRA), the American Indian Religious Freedom Act (AIRFA), and the Archaeological Resources Protection Act (ARPA)), Presidential Executive Orders (including Executive Order 13007—Indian Sacred Sites and Executive Order 13175—Consultation and Coordination with Indian Tribal Governments), regulations, and case law as well as in the policy statement of the Advisory Council on Historic Preservation entitled *The Council's Relationship with Indian Tribes*.

**(1) Federal Statutory Consultation Obligations with Tribal Nations on Religious Matters.** Congressional Indian policy with respect to Indian religious matters is set forth in the American Indian Religious Freedom Act (AIRFA):[37]

> Protection and preservation of traditional religions of Native Americans
>
> > Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.[38]

[37] Pub. L. No. 95-341, Section 1, 92 Stat. 469 (1978) (codified at 42 U.S.C. Section 1996 (1988).
[38] 42 U.S.C. Section 1996.

AIRFA also requires federal agencies to consult with Native American traditional religious leaders in order to evaluate existing policies and procedures and make changes necessary to preserve Native American cultural practices.[39]

There are several other statutes where Congress has set forth a policy of protecting traditional Indian religion, such as NAGPRA,[40] ARPA,[41] and the National Museum of the American Indian Act.[42] The consultation requirements of, and legal rights established by, these statutes are not geographically confined to situations where cultural or religious objects are found (or activities occur) solely on tribal lands.

**(2) Executive Action.** There are several presidential orders that mandate Federal consultation with Tribal Nations. Executive Order 13007 (May, 24 1996) (hereafter "Executive Order on Sacred Sites") directs federal agencies to provide access to American Indian sacred sites, to protect the physical integrity of such sites and, where appropriate, to maintain the confidentiality of these sites. This Executive Order on Sacred Sites also incorporates a prior Executive Memorandum issued on April 29, 1994, which directed federal agencies to establish policies and procedures for dealing with Native American Tribal Governments on a "government-to-government basis."

Executive Order 13175 (Consultation and Coordination with Indian Tribes, November 6, 2000) directs Federal officials to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications.

**(3) Federal Communications Commission Policy Statement.** The Commission has adopted a policy which sets forth these basic principles of Federal Indian law with great clarity. USET applauds the inclusion of substantial portions of this policy statement in the "Whereas" clauses of the draft NPA.

**(4) Federal Court Interpretation of Indian-Related Statutes.** The Federal Courts have developed canons of construction that are used to interpret Indian treaties and statutes relating to Indians. The fundamental component of these canons of construction is that treaties and statutes are to be liberally interpreted to accomplish their protective purposes, with any ambiguities to be resolved in the favor of the Indian tribes or individual Indians. See *Alaska Pacific Fisheries Co. V. United States*, 248 U.S. 78, 89 (1918) ("the general rule [is] that statutes passed for the benefit of the dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164 (1973). In this context, the National Historic Preservation Act should be read broadly to support and protect tribal interests.

Consistent with these principles, NHPA and NEPA should be read broadly to support and protect tribal interests.

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[39] Act of Aug. 11, 1978, P.L. 95-341, Section 2. 92 Stat. 470.
[40] Pub. L. No. 101-601, Section 2, 104 Stat. 3048 (1990) (codified at 25 U.S.C. Sections 3001-13 (Supp. III 1991)).
[41] Pub. L. No. 96-95, Section 2, 93 Stat. 721 (1979)(codified at 16 U.S.C. Sections 470aa-70mm (1988)).
[42] 20 U.S.C. Sections 80q to 80q-15.

## *VI. CONCLUSION*

Tribal Nations are motivated in this proceeding by two things: the protection of our cultural and religious heritage and the preservation of tribal sovereignty and the Federal trust responsibility. Over the years, the United States has advocated many policies, such as "Manifest Destiny" or the distribution of "40 Acres and a Mule" out West, which were widely lauded as beneficial to the United States but which came at great expense to Tribal Nations. NEPA and NHPA are meaningless to Tribal Nations if broad exemptions are created and Tribal Nation resources are so limited that they cannot assert their rights. Industry has and will continue to make tremendous profits. This is appropriate. However they, and not tribes, should bear the cost of this dramatic expansion of the telecommunications infrastructure.

In sum, Tribal Nations are very disappointed by the draft Report and Order. This document does not uphold the Commission's trust responsibility to Tribal Nations and instead favors Industry. Further, the Commission's blanket designation of small wireless facilities as not subject to NHPA and NEPA requirements is unlawful. If this item moves forward, cultural and historic resources will inevitably be damaged by wireless infrastructure. Our organizations urge all Commissioners to vote against this item.